IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM
ABDULLAH AL SHIMARI *et al.*,

Plaintiffs,

v.

CACI INTERNATIONAL, INC., *et. al.*,

Defendants

C.A. No. 08-cv-0827 GBL-JFA

PLAINTIFFS' OPPOSITION TO CACI'S
MOTION FOR SECTION 1292(b) CERTIFICATION

Two-and-a-half years ago, CACI made the strategic decision to pursue a direct appeal of its March 18, 2009, Order in lieu of seeking certification from this Court under Section 1292(b). CACI belatedly seeks to change course, but the only thing that has changed is the prospect that CACI's chosen reliance on the collateral order doctrine will be rejected by the Fourth Circuit rehearing the case *en banc*. CACI brazenly suggests that the possibility that CACI may lose on jurisdictional grounds should suffice to persuade this Court to certify – belatedly – the case under Section 1292(b). As explained below in Argument, however, this Court lacks jurisdiction over this case, as it is pending before the Fourth Circuit, not the District Court. CACI lacks any legal authority for the novel proposition being urged. CACI made its own jurisdictional bed more than two years ago; it must lie in it.

PROCEDURAL BACKGROUND

On September 15, 2008, Plaintiffs filed an Amended Complaint alleging that they were tortured by CACI and its co-conspirators. *See* Dkt. No. 28.

On October 2, 2008, CACI moved to dismiss the complaint. *See* Dkt. Nos. 34 and 35. CACI argued for dismissal by relying not on the allegations in the Amended Complaint but rather on CACI's own view of the facts. *See e.g*. Dkt. No. 35 at 9, 16 and 17. Yet CACI did not attach any evidence, and did not seek to convert the motion to one for summary judgment.

On March 18, 2009, this Court issued a Memorandum Order denying CACI's motion to dismiss. *See* Dkt. No. 94. The Court held that discovery was needed in order to rule on CACI's claims. *See* Dkt. No. 94 at 26-27 (citing need for discovery to fully consider CACI's derivative absolute immunity argument); *id*. at 29 (stating that the Court has "insufficient evidence at this stage of the litigation" to make conclusive findings regarding CACI's arguments); *id.* at 34 ("[t]he scope of Defendants' contract is thus an open issue that requires discovery.") *id.* at 35 ("discovery . . . is necessary"); *id.* at 37 ("discovery is needed").

On March 23, 2009, despite this record, CACI filed a notice of direct appeal. *See* Dkt. No. 96.[1] Plaintiffs, believing CACI was pursuing appeal prematurely and without having awaited the Court's final rulings on CACI's legal theories, filed a motion seeking to strike the notice of appeal. *See* Dkt. No. 103 (memorandum in support), arguing that the Court had not issued any appealable final judgment, and CACI could not appeal except through the Section 1292(b) certification process.

[1] In contrast, CACI sought and obtained Section 1292(b) certification in the *Saleh* action pending in the District of Columbia.

CACI opposed that motion, claiming the notice of appeal divests the District Court of jurisdiction over the action. CACI mocked Plaintiffs for seeking redress from the District Court: "Plaintiffs' motion takes the absurd position that *this Court* has the power to decide *appellate court* jurisdiction. . ." *See* Dkt. No. 104.

On March 31, 2009, this District Court ruled that "any deficiencies in the substance or manner of Defendants' appeal are properly addressed by the United States Court of Appeals for the Fourth Circuit, not this Court." *See* Dkt. No. 109. Thereafter, discovery was stayed. *See* Dkt. No. 111.

On April 27, 2009, Plaintiffs filed with the Court of Appeals for the Fourth Circuit ("Fourth Circuit") a motion seeking to dismiss CACI's appeal, arguing a direct appeal was premature because the District Court had not issued a final appealable order. On May 8, 2009, CACI opposed that motion, arguing that the District Court's order was immediately appealable and the discovery cited by the District Court was not actually needed to resolve the issues. The Fourth Circuit denied the motion to dismiss, exercised jurisdiction over the action, sought and obtained extensive briefing from the parties, heard oral argument, and then ruled in favor of CACI.

Thereafter, on November 8, 2011, the Fourth Circuit granted rehearing *en banc*. On November 15, 2011, the Fourth Circuit issued an order directing the parties to be prepared at oral argument to address both jurisdictional and merits issues during oral argument.

ARGUMENT

CACI now seeks to have this District Court ignore this procedural history, including both the Court's own order (Dkt. No. 109), and the Fourth Circuit's rulings, and permit CACI to alter the jurisdictional terrain in advance of *en banc* Fourth Circuit review. This Court should deny

CACI's motion. As explained in Section I, controlling Supreme Court and Fourth Circuit authorities prohibit this Court from exercising jurisdiction over this action, which is pending before the Fourth Circuit. *See Marrese v. A. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 378-79 (1985); Griggs *v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Dixon v. Edwards*, 290 F.3d 699 (4th Cir. 2002); *United States v. Christy*, 3 F.3d 765, 767 (4th Cir.1993); and *United States v. Ball*, 734 F.2d 965 (4th Cir.1984). CACI's direct appeal under Section 1291 and the collateral order doctrine already has been and will be again heard by the Fourth Circuit. As this Court held in its March 31, 2009, Order (Dkt. 109), the Fourth Circuit is the proper party to rule on the parties' dispute over whether CACI properly asserted collateral order jurisdiction. Unless CACI withdraws its direct appeal, this Court lacks the jurisdiction to certify the case under Section 1292 because the case is pending before the Fourth Circuit, not this Court.

As explained in Section II, none of the legal authorities cobbled together by CACI actually support CACI's last-ditch effort to evade a potential defeat in the Fourth Circuit. Those cases merely reflect application of the general proposition that district courts retain the ability to take ministerial steps to aid the appellate courts. None of them stand for the novel legal premise that a District Court's certification under Section 1292(b) on the facts found here should be deemed "ministerial." Indeed, nothing could be further from the truth, as District Court certification is the first step of a procedural path that results in appellate jurisdiction over non-final judgments under Section 1292. CACI opted not to walk that procedural path after the District Court issued its March 18, 2009, Order, and is thus barred by well-settled principles of judicial estoppel from trying to do so now.

I. THIS COURT LACKS JURISDICTION OVER THE LAWSUIT.

The Fourth Circuit, not this Court, has jurisdiction over this case. CACI directly appealed the Court's Order under Section 1291 and the collateral order doctrine. The Fourth Circuit opted not to dismiss the appeal, as requested by Plaintiffs. Instead, the Fourth Circuit exercised and continues to exercise jurisdiction over the action. This active and ongoing Fourth Circuit jurisdiction divests this Court of jurisdiction over all aspects of the case. *See Marrese v. A. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 378-79 (1985). It is well accepted that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

As such, "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); Dixon *v. Edwards*, 290 F.3d 699, 709 n.14 (4th Cir. 2002); United *States v. Christy*, 3 F.3d 765, 767 (4th Cir.1993); *United States v. Ball*, 734 F.2d 965, 965 n.1 (4th Cir.1984). CACI is well of this rule, having invoked it vigorously in opposing Plaintiffs' motion before this court to strike CACI's Notice of Appeal. *See* Dkt. No. 104 at 4 ("When, as here, a defendant appeals from a denial of an assertion of immunity, the district court is divested of jurisdiction over the case in its entirety."); *see also id.* at 5-7 (citing and discussing cases).

CACI fails to cite any legal authority that would permit this Court to exercise jurisdiction over this case. There is a narrow exception to the general rule that the Notice of Appeal divests the district court of jurisdiction for issues the district court decides that are "in aid of the appeal" (In *re Grand Jury Proceedings Under Seal*, 947 F. 1188, 1190 (4th Cir. 1991)); but the Fourth

Circuit has made crystal clear that this narrow exception covers only ministerial actions that assist in the technical disposition of the appellate court's judgment. *See In re Thorp*, 655 F.2d 997, 998 (4th Cir. 1981) (exception to divesting jurisdiction exists "in aid of the appeal, or to correct clerical mistakes, or in aid of execution of a judgment that has not been superseded, until the mandate has been issued by the court of appeals"); *Stewart v. Donges*, 915 F.2d 572, 575 n. 3 (10th Cir. 1990) (district courts retain jurisdiction over ministerial matters in aid of the appeal and matters tangential to the appeal).

The narrow doctrine is "designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time." *Id*. (citing 9 More, Federal Practice § 203.11 n.1). Thus, for example, in *In re Grand Jury Proceedings,* the Fourth Circuit concluded that the district judge's written opinion, which memorialized an oral ruling issued one day earlier that was the basis for the Notice of Appeal, was "in aid of appeal" by "by giving this Court a written order to review." *Id*. Similarly, in *Dixon v. Edwards*, 290 F.3d 699, 709 n. 14 (4th Cir. 2002), the district court "aided in this appeal by relieving [the court of appeals] from considering the substance of an issue begotten merely from imprecise wording in the injunction."

There is no authority that suggests that Section 1292(b) certification is a ministerial matter that can be done to aid the Fourth Circuit's jurisdiction which is being exercised pursuant to a notice of direct appeal. CACI cites to no such authority. Instead, CACI argues that the risk that the Fourth Circuit will dismiss on jurisdictional grounds and not to reach the merits should suffice as reason for this Court to entertain simultaneous jurisdiction with the Fourth Circuit, and certify the action under Section 1292. But risk of CACI losing the appeal *en banc* is not the type of ministerial issue that permits this Court to exercise jurisdiction simultaneous with the Court of

Appeals. Def's Br. at 15. Tellingly, CACI did not ask this Court to take any steps to shore up Fourth Circuit jurisdiction when the case was pending before a panel, not the entire Court. Yet CACI could have lost its jurisdictional gamble at that juncture as well.

This Court lacks jurisdiction to grant CACI the relief requested in its motion. Section 1292 certification is not a ministerial act. It is a substantive act that changes the jurisdictional underpinnings for an appeal.

The narrow set of cases CACI cobbles together in support of an exception to this clear rule suggest at most that a court may certify collateral issues pendant an appeal already noticed (pursuant to Fed. R. Civ. P. 54(b)); they certainly do not support the remarkable proposition that a district court has jurisdiction to certify an entire appeal solely to shore up the appeal's jurisdictional basis and after counsel purposefully rejected the certification process for a period of years.

More specifically, all the cases cited by CACI are distinguishable from the facts here. None of the litigants waited a period of years after the filing of the notice of direct appeal before seeking Section 1292 (b) certification. For example, in the *Pelt v. Utah* case, 539 F.3d 1271 (10th Cir 2008), the appellants filed a motion seeking Section 1292(b) certification on the ***very same day and prior to*** filing their notice of appeal. *See Pelt v. Utah*, No. 92-639, *compare* Dkt No. 1023, Feb. 10, 2006 (Motion for Certification Under Rule 54(b) and 28 U.S.C. § 1292(b)) *with* Dkt No. 1025, Feb. 10, 2006 (Notice of Appeal). The appellants based their notice of appeal on 28 U.S.C. § 1291 and § 1292(a), while seeking contemporaneous certification via §1292(b) in the district court. While the notice of appeal was pending, the district court certified the appeal pursuant to Section 1292(b), which the Tenth Circuit concluded simply mooted the earlier-asserted basis for appellate jurisdiction. This course of action – contemporaneous pursuit

of certification under 1292(b) -- is exactly what CACI chose *not* to do as a tactical matter. As such, *Pelt* plainly undercuts their argument.

In re Jartran, Inc., 886 F.2d 859 (7th Cir. 1989), is similarly harmful to CACI's cause. In this appeal of a bankruptcy court order, all of the parties and the district court mistakenly believed there was an appealable final order under the relevant bankruptcy provision. In fact, the court had not issued a final order, which left the Seventh Circuit without jurisdiction. There, the district court, not the Seventh Circuit, had jurisdiction over the action.

Here, CACI continues to assert that, unlike the Seventh Circuit in *Jartran*, the Fourth Circuit *does* have jurisdiction over this appeal under the collateral order doctrine. Under this logic and the import of *Jartran*, therefore, CACI must concede this Court is divested of jurisdiction to now issue a certification order. Alternatively, if CACI wishes to pursue certification at this late date it must first withdraw its current appeal and concede lack of collateral order jurisdiction, which would revest this court with jurisdiction to consider its certification request.

The other cases relied upon by CACI also fail to persuade, as none stands for the proposition that a district court is empowered to exercise simultaneous substantive jurisdiction over an action pending before the Court of Appeals for the Fourth Circuit. *See Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 531 (4th Cir. 1991) (accepting appeal under Rule 54(b) to resolve partial claims, where Notice of Appeal filed shortly thereafter); *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) (pendency of appeal of independent criminal contempt judgment, did not preclude certification of merits of the case under 1292(b), over which district court plainly retained jurisdiction).

When the District Court denied CACI's motion to dismiss on March 18, 2009, CACI could have asked the Court to certify its March 18, 2009, Order as it had done in the *Saleh* matter. Instead, CACI filed a notice of direct appeal and relied on the collateral order doctrine. Plaintiffs unsuccessfully sought to persuade the Fourth Circuit to dismiss the action. Instead, the Fourth Circuit intentionally exercised – and continues to exercise --- jurisdiction over the action. CACI has not – and cannot – explain why this Court should step into an action over which it lacks jurisdiction merely to protect CACI from the logical consequences of its own deliberate decision to seek direct appeal rather than appeal after certification.

CACI cannot have it both ways: If CACI wants this Court to have jurisdiction and certify the action, CACI has to dismiss the direct appeal. Unless CACI dismisses the direct appeal, the *en banc* Fourth Circuit, not this Court, will decide whether CACI's jurisdictional gamble pays off or not.[2] But in the meantime, nothing supports the proposition that this Court is free to exercise simultaneous jurisdiction over an action pending before the Fourth Circuit in order to help CACI by belatedly manufacturing an alternate theory of appellate jurisdiction. This Court clearly lacks jurisdiction to consider CACI's belated motion to certify, and no case cited by CACI holds otherwise.

II. WELL-SETTLED AND CONTROLLING SUPREME COURT AND FOURTH CIRCUIT LAW PROHIBITS CACI'S LAST-DITCH EFFORT TO CHANGE POSITIONS.

Even if this Court had jurisdiction (which it does not), CACI should be judicially estopped from moving for Section 1292(b) certification. Presumably because it feared this Court would not have certified is May 2009 Order for interlocutory appeal (given this Court's

[2] The Fourth Circuit has consolidated this action with another action brought against a company called L-3, which also relied on the collateral order doctrine to appeal directly and without Section 1292 (b) certification from an Order by the District Court (J. Missette) in Maryland.

statements that discovery was needed to ascertain the *bona fides* of CACI's asserted defenses), CACI pursued appellate jurisdiction via a direct appeal under the collateral order doctrine. As a result of that litigation strategy by CACI, Plaintiffs and the courts have spent hours analyzing and considering CACI's preferred basis for appellate jurisdiction. CACI cannot just ignore this past history, and be permitted to change course merely because it fears the *en banc* rehearing. Gamesmanship of this sort should not be condoned by this Court.

CACI describes the virtue and validity of its request for certification under Section 1292(b), as if the parties and this court are operating on a blank slate. *See, e.g.* Def's Br. at 15 ("the present motion is seeking a course expressly identified and endorsed by the single Fourth Circuit judge dissenting on jurisdiction"). But as CACI itself concedes, it could have availed itself of the certification procedures of Section 1292(b) in this Court, who has "first line discretion to allow interlocutory appeals". Def's Br. at 7 (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995)). Each of the arguments CACI now makes – including the existence of a controlling question of law, a desire for guidance on the merits, the contested nature of the immunity defenses and the like – could have been made two and a half years ago.[3] Instead, CACI filed a direct appeal rather than seek certification, presumably because it feared the outcome given the District Court's clear statements that discovery was needed before the various immunity and preemption issues were ripe for decision. Nothing has changed except that the Fourth Circuit's decision to grant *en banc* review and be briefed on the jurisdictional issue leads CACI to believe that the jurisdictional basis for their appeal is on thin ice.

[3] In light of this Court's lack of jurisdiction over CACI's motion, Plaintiffs are not briefing their Opposition to these issues as they would have done had CACI timely filed a motion seeking certification under Section 1292(b).

CACI's fears do not merit Court action. Parties to litigation must live with the consequences of their strategic choices particularly where, as here, CACI's decision to reject the certification process in favor of collateral order jurisdiction has taken Plaintiffs down the expensive and time consuming course of having to litigate the collateral order doctrine. Even were the Court to have jurisdiction (which it does not), the unfairness to plaintiffs and the courts alone precludes permitting CACI to seek certification. The equitable doctrine of judicial estoppels prohibits parties "from deliberately changing positions according to the exigencies of the moment" in order to "protect the integrity of the judicial process" (internal quotation marks and citations omitted). *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); *John S. Clark Co. v. Faggert & Frieden, P.C.,* 65 F.3d 26, 28–29 (4th Cir.1995) ("Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. The purpose of the doctrine is to prevent a party from ***playing fast and loose with the courts***, and to protect the essential integrity of the judicial process.") (emphasis added, citations and internal quotation marks omitted).

CACI has played "fast and loose" with the courts, by consistently defending one jurisdictional theory for a period of years, then attempting to switch back to an alternate theory when its chosen course seems in jeopardy. Doctrines of judicial estoppels require CACI to choose one jurisdictional theory or another, not both. Section 1292(b) states "[w]hen a district judge, in making in a civil action an order ***not otherwise appealable*** under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for different of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." The only way CACI should be permitted to proceed with a motion for certification – i.e.

to fundamentally alter the theory of appellate jurisdiction it has pursued in this case – is if CACI first abandons its direct appeal in the Fourth Circuit.

CONCLUSION

For the foregoing reasons, the Court should deny CACI's Motion for Certification pursuant to 28 U.S.C. § 1292(b).

/s/ Susan L. Burke

Susan L. Burke (VA Bar #27769)
BURKE PLLC
1000 Potomac Street, N.W.
Washington, DC 20007-1105
Telephone: (202) 386-9622
Facsimile: (202) 232-5513
sburke@burkepllc.com

Katherine Gallagher
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Shereef Hadi Akeel
AKEEL & VALENTINE, P.C.

888 West Big Beaver Road
Troy, Michigan 48084-4736

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November 2011, we filed the Plaintiffs' Opposition to CACI's Motion for Certification via ECF, which will send a notification to counsel for Defendants.

/s/Susan L. Burke
Susan L. Burke (VA Bar No. 27769)
Counsel for Plaintiffs
BURKE PLLC